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**The Constitutional Court of Hungary
Magyar Köztársaság Alkotmánybírósága**

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Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

Questionnaire

National Report of Hungary

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

Since the period of the democratic transition in 1989-1990 the Constitutional Court of Hungary has had the authority to make constitutional rights and principles meaningful in practice. Hence the Court for two decades had decided many cases involving the principles of separation of powers, the rule of law, democracy and the principle of equality. The 1989 Constitution did not contain a specific rule on the scope of constitutional decision-making in terms of referring to specific legal sources, however, it contained that the Constitutional Court had the competence to annul unconstitutional legal regulations. The constitution currently in force, called the Fundamental Law contains two relevant provisions. First, the preamble 'National Avowal' has normative strength, since Article R (3) of the Fundamental Law stipulates that "(t)he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution." Second, under Article N (3) in performing its duties the Constitutional Court shall be obliged to observe the principle of balanced, transparent and sustainable budget management.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there

any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

The preamble of the Fundamental Law called the ‘National Avowal’ contains several foundational principles, such as the principle of human dignity, “fidelity, faith and love” as well as “safety, order, justice and liberty”. In addition, under Article B (1) “Hungary shall be an independent, democratic rule-of-law State”, Article C (1) contains the principle of division of powers. According to Article R (3) of the Fundamental Law the Constitutional Court should interpret the Fundamental Law in accordance with the National Avowal and the achievements of the Hungarian historical constitution. In its Decision 33/2012 the Court has already applied this special rule on interpretation. The Constitutional Court determined the achievements of the historical constitution on independence of judges. The Court argued that many statutes adopted in the 19th century formed a solid base of a modern State governed by the rule of law. The Court cited two historical statutes on judges of that time: Act 1869:IV. and Act 1871:IX. The Court held that one of the achievements of the historical constitution is the special status and special treatment of judges by the lawmaker. Independence and irremovability of judges are also achievements of the historical constitution that are obligatory for all and these principles are to be considered when interpreting other norms of the legal system. The stability of the judges’ service is a constitutional requirement that needs special protection and guarantees: the reasons, the term of office and the maximum age are to be regulated in cardinal acts.

In several cases, such as in decision 6/2013 and in 36/2015 – the first was taken on state recognition of churches, while the second on state owned pieces of lands marketing to tillers – the Constitutional Court annulled the concerned provisions of the challenged Acts since the principle of the hierarchy of norms, therefore the principle of the rule-of-law was violated. It is fair to say that the Constitutional Court often quotes some aspects of the rule of law principle when the violation of Article B (1) of the Fundamental Law is invoked. The ban on retrospective legislation and the requirement of allowing sufficient time for the persons concerned to prepare for the application of the legal norm (principle of sufficient preparation time) – as parts of rule of law principle – have been invoked in most cases where the violation of Article B (1) of the Fundamental Law was stated. In Decision 32/2015 the Constitutional Court annulled a regulation – on the basis of violation of the principle of sufficient preparation time – that governed financial institutions to pay uncertain amount of money within undefined time period in order to compensate former clients of a financial institution having become bankrupt.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

An example for an implied principle could be the principle of separation of powers. The previous 1989 Constitution did not explicitly contain the principle of separation of powers, however the Constitutional Court interpreted it as an essential element of the rule of law. Furthermore, the Constitutional Court considered it “the most important operational and organizational principle of the Hungarian State” (Decision 31/1990). “The principle of separation of powers means not merely that one power shall not take over the competencies of the other, but also that democratic States under the rule of law shall not have unlimited and illimitable power, and to achieve this, certain powers necessarily limit the competencies of other powers” (Decision 2/1995). It should be emphasized that the Fundamental Law – having incorporated the interpretation of the Constitutional Court – contains the principle in Article C (1).

Quoting the principle of separation of powers, the Constitutional Court annulled a uniformity decision of the Curia arguing that it – beyond its competence – not solely interpreted the concerned regulation but adopted a new law instead (Decision 2/2016).

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon *travaux préparatoires* of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognized legal principles gain relevance in this process?

Neither the 1989 Constitution nor the Fundamental Law determines any authoritative method of constitutional interpretation. However, the Fundamental Law does contain some guidelines for interpretation. Article R (3) of the Fundamental Law stipulates that “(t)he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.” Under Article N (3) in performing its duties the Constitutional Court shall be obliged to observe the principle of balanced, transparent and sustainable budget management. Besides, Article I (3) of the Fundamental Law refers to the so-called necessity-proportionality test developed by the jurisprudence of the Constitutional Court in the first two decades. In practice, the Constitutional Court frequently uses different interpretive methods (grammatical, textual,

objective, teleological, historical, teleological, etc.) for deciding cases and the Court chooses the proper interpretive method case-by-case.

The generally recognized principles of international law played an important role in the Hungarian constitutional jurisprudence. Article 7 of the 1989 Constitution stipulated that the legal system of the Republic of Hungary accepted the generally recognized principles of international law, that is, the principles which are recognized by the legal systems of most (civilized) countries, and are applied in practice. Their legal characteristics have been dealt with in details in Decision 53/1993. In this decision the Court held that these general principles form part of the Hungarian law without further transformation. It was not necessary, therefore, to promulgate them with domestic law, because the transformation has been already done by Article 7 of the Constitution itself. In accordance with this, Article Q (3) of the Fundamental Law reads that “Hungary shall accept the generally recognized rules of international law.”

Moreover, while examining the Fourth Amendment to the Fundamental Law, the Constitutional Court in Decision 12/2013 argued that when deciding on constitutional obligations resulting from international conventions, or from the membership of the European Union, generally recognized principles of international law, and the basic principles and values of international law shall be taken into consideration.

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter’s interpretation?

Two constitutional principles were decisive in the first two decades of the constitutional adjudication in Hungary: the rule of law and equality before the law. Of these two constitutional principles, the rule of law played a greater role given the specific historical circumstances. This principle developed soon to become a sufficient basis for establishing a violation of the Constitution. The principle of equality before the law was the other clause the petitioners most frequently referred to in their petitions. In Decision 61/1991 the Court adopted an expansive interpretation of the equality clause holding that “the prohibition of discrimination (...) extends to the entire legal order”. It is true; however, that the prohibition of discrimination governed for the whole legal system only if the discrimination eventually violated human dignity.

After the Fundamental Law entered into force in 2012 the protection and implementation of the fundamental rights – especially the right to human dignity, the right to property and the right to fair trial – have been invoked more likely by the Constitutional Court. In Decision

17/2014 the Constitutional Court (on the basis of right to human dignity, right to have one's private and family life, home, communications and good reputation and the principle of being equal before the law having been infringed) annulled a regulation which prescribed that the employees – before being given a notice – were obliged to inform the employers about their pregnancy. In Decision 8/2013 the Constitutional Court delivered a binding constitutional requirement stating that Article XXVII (3) of the Fundamental Law (right to defense) requires that the lawyer of an accused person shall be provided with information – in reasonable time – on the exact date and place of the hearings in order to practice his or her procedural rights. Furthermore, in Decision 14/2014 the Constitutional Court argued that the National Assembly violated the Article XV (2) (equality before the law) and Article XVI (1) (children's right to the protection and care necessary for their proper physical, mental and moral development) of the Fundamental Law by having not adopted an Act which rules out that an only child living with his or her married parents shall receive the same amount of grant or benefit that a child living in a family where the parents are living in a civil partnership.

It should be emphasized that the interpretation of the Constitutional Court – regarding the most important constitutional principles – had been incorporated into the Fundamental Law. Therefore, ever since, the Constitutional Court shall be quoting them as formal regulations, not as its own interpretations.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

Of all constitutional principles, the rule of law played a special and significant role in the Court's jurisprudence. It represented the essence of the regime change after 1989. The Constitutional Court followed a formalistic and neutral understanding of the rule of law. It insisted that political intentions could only be implemented lawfully and within the framework of the Constitution – not vice versa, as before 1989, when the law was conceived as a merely political tool. In the Court's phrase a 'revolution under the rule of law' happened in 1989. The revolutionary changes had been introduced by strictly keeping all constitutional guarantees, therefore the system change had to be considered to be of a morally higher value than the previous, similarly revolutionary changes, for by respecting constitutional limitations it could not repeat crimes and injustices that revolutions usually understand to be justified and permissible. This view led the Court to conclude in questions concerning retroactive justice that in cases of ex post facto criminal legislation the formal rule of law has priority to the demand of doing substantive justice. Therefore in Decision 11/1992 the Court annulled the Act which would have retroactively extended the statute-of-limitations and would have allowed for the prosecution of perpetrators of murder and torture in the aftermath of the 1956 uprising against Soviet rule. The Court argued that the 1989 Constitution did not and could

not confer a right for substantive justice: “Reference to historical situations and the rule of law’s requirement of justice could not be used to set aside legal certainty as a basic guarantee of the rule of law” (Decision 11/1992).

The case law confirmed that the rule of law was not a mere declaration; it had a fundamental value. (Decision 9/1992) The Court settled ‘legal certainty’ as the core element of the rule of law, which required the unambiguity of legal norms but also the predictability of the operation of the legal institutions. For this reason procedural guarantees (such as the protection against retroactive laws, and the requirement of ‘reasonable time’ before an adopted law comes into force) emerged as important features of the rule of law. In the Court’s interpretation the rule of law required from public authorities to perform in accordance with the law, that is, within the organizational framework determined by law, according to the procedure prescribed by law, and within the limits regulated by law, accessible and predictable for citizens. (Decision 56/1991)

Since the Fundamental Law entered into force in 2012 the decisions of the Constitutional Court have reflected the individual’s fundamental rights protection instead of focusing on the evaluation of the rule of law principle. Having said that, the principle of rule of law still constitutes a cornerstone in the Hungarian constitutional judiciary (referring to the abovementioned Decision 32/2015).

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

The Constitutional Court, in the beginning of its operation tended to interpret legal provisions on the basis of constitutional principles such as the human dignity or the rule of law. This way the Court constructed the corpus what the first president of the Constitutional Court called the ‘invisible constitution’. This view differentiated between the text of the constitution and the principles followed by the constituent power that had created the constitutional order. The ‘invisible constitution’ concept served as the set of crucial principles that made up the foundational constitution’s commitments. Many legal scholars in Hungary criticized this development; they had considered the Constitutional Court to go against democratic principles.

Nonetheless, the incorporation of the interpretations of the Constitutional Court – regarding the above mentioned principles – into the Fundamental Law allows the Constitutional Court to invoke them as formal regulations and to not interpret them constantly. The principle – and the rules – of the conditions of restricting Fundamental Rights in Article I (3) should be mentioned.

2. What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

The Constitutional Court, in the first decade of its operation made an attempt to classify particular fundamental rights in a hierarchical fashion. The right to life and human dignity as absolute rights were put on the top of the hierarchy (Decision 23/1990), closely followed by freedom of opinion as “mother” of the communication rights (Decision 30/1992), and the freedom of religion (Decision 4/1993). All other fundamental rights followed. This classification suggested in principle, that no fundamental rights could be asserted against the indivisible and unrestrictable right to life and human dignity, while the freedom of opinion and freedom of religion could be subjected to less limitation than other fundamental rights. Nevertheless, the system of strict ranking had not become the key solution when deciding constitutional cases.

After the adoption of the new Fundamental Law, the Constitutional Court suffered a restriction on its constitutional adjudication, in case of certain Acts which are on budgetary and tax issues. The scope of the restriction is based on the economic performance of the country. Pursuant to Article 37 of the Fundamental Law, as long as the level of state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence pursuant to points b) to e) of paragraph (2) of Article 24 (norm control), review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship, and it may only annul these Acts for the violation of these rights. It means that in case of the violation of other fundamental rights the Constitutional Court may not examine the challenged norm and has to reject those petitions for lack of competence. It means also that the above mentioned rights enjoy a higher level of protection.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law?

The Fundamental Law of Hungary is relatively easy to amend. The amendment process does not render any constitutional provision or principle unamendable. It does not contain a so-called “eternity clause”. Under Article S (2) of the Fundamental Law two-thirds of Members of Parliament are needed to ratify amendments or to adopt a completely new constitution. Therefore, the constitution is relatively flexible. Only one legislative body has the sole power to change the constitutional text. Neither a referendum, nor any form of ratification (for example approval by the subsequent parliament) is required to ratify a new constitution or a constitutional amendment.

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

During the adoption of the Fundamental Law and its subsequent amendment some legal scholars argued that the judicial review of constitutional amendments was not only possible but also justified. Others were of the opinion that although the judicial review would have been justified, it was not possible under the previous case law of the Constitutional Court. The third group of scholars argued that judicial review of the recent constitutional amendment was neither possible nor justified. Today the question of reviewing constitutional amendment is not under debate.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

The Fundamental Law, as amended by the Fourth Amendment, authorizes the Court to examine a priori, whether the formal requirements for constitutional amendments have been fulfilled, but the judicial review may not extend to the content of the constitutional amendment, or its relation to the rest of the Fundamental Law. Under Article 24 (5) of the

Fundamental Law “The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation.” Article S (3) of the Fundamental Law stipulates that “if the President of the Republic finds that any procedural requirement laid down in the Fundamental Law with respect to adoption of the Fundamental Law or the amendment of the Fundamental Law has not been met, he or she shall request the Constitutional Court to examine the issue”. Under Section 23/A of the Act on the Constitutional Court, the Court examines for the compliance with the procedural requirements for the adoption of the Fundamental Law or for its amendment established by the Fundamental Law. In Decision 12/2013, the Court accepted this development by saying that it lacked the competence to compare the amendment (in that case the Fourth Amendment of the Fundamental Law) – with regard to their content – to other provisions of the Fundamental Law and to the Constitutional Court precedents.

6. Is the constitutional court authorized to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court’s reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? Please, provide examples from the jurisprudence of the constitutional court.

For a long time, the Constitutional Court did not recognize its power to determine that an amendment to the Constitution was unconstitutional. A Presidential Order argued that “the resolution of the assumed or actual contradictions of the Constitution” is outside the competence of the Constitutional Court (Presidential Order no. 1125/I/1996) and the plenary court held that it may not annul certain provisions of Acts of Parliament that amended the Constitution, because „if a provision became a part of the Constitution as supported by the vote of two-thirds of the members of Parliament, it is *per definitionem* impossible to establish its unconstitutionality" (Order no. 23/1994. (IV. 29.)). However, the Constitutional Court recognized its authority to determine the constitutionality of an amendment to the Constitution from a procedural point of view. That is, whether the mechanism, by which the amendment was enacted in Parliament, was authorized to do so. In addition, a decision made it clear that an Act of Parliament, on the entering into force of a constitutional amendment, could be subject of judicial review: ”In certain cases, in principle, the Constitutional Court may have a competence hearing, regarding specific provisions of the Act that put into force an amendment of the Constitution, on the condition that the potential annulment of the provision of putting the amendment into force would not result in any change to the Constitution” (Decision 1260/B/1997). In accordance with this, in Decision 61/2011, the Court denied itself the authority to perform a review of the substance of the amendment. However, in Decision

45/2012, the Court examined the constitutionality of the Transitional Provisions. In 2011 after the Fundamental Law was enacted, Parliament adopted Transitional Provisions to the Fundamental Law. The Transitional Provisions themselves declared their own constitutional character. The Ombudsman initiated the constitutional review of the Transitional Provisions questioning the normative and hierarchical status of the Transitional Provisions. Following its precedents, the Constitutional Court undertook an investigation into the constitutional validity of the Transitional Provisions, in terms of the procedure that led to its adoption. Moreover, in this decision the Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality. The Court seemed to have cautiously suggested an inner hierarchy within the Fundamental Law: “the constitution-maker may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law” (Decision 45/2012). The Court even found a hierarchy stemming from the *ius cogens* part of international law: “Constitutional legality has not only procedural, formal, and public law validity requirements; but also substantial ones. The constitutional criteria, of a democratic State under the rule of law, are at the same time constitutional values, principles, and fundamental democratic freedoms enshrined in international treaties; and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalisation of the substantial requirements, guarantees and values of democratic States under the rule of law” (Decision 45/2012).

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court’s power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court’s authority encourage the realization of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

The Fundamental Law does not authorize the Court to review the substance of constitutional amendments. Although the Constitutional Court tried to create itself the authority for extended judicial review, Decision 45/2012 in that regard was overridden by the Fourth Amendment of the Fundamental Law.